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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. CLIFTON HARALSON III and JAHSEE ELAN BREWSTER, Defendants and Appellants.	G054546 (Super. Ct. No. 16NF0951) O P I N I O N

Appeals from judgments of the Superior Court of Orange County, Glenda Sanders, Judge. Affirmed.

Jean Matulis, under appointment by the Court of Appeal, for Defendant and Appellant Clifton Haralson III.

Rex Adam Williams, under appointment by the Court of Appeal, for Defendant and Appellant Jahsee Elan Brewster.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Daniel Rogers, Adrianne S. Denault and Christopher P. Beesley, Deputy Attorneys General, for Plaintiff and Respondent.

Appellants Clifton Haralson III and Jahsee Elan Brewster were convicted of pimping, pandering, and trafficking Briana D, a minor. On appeal, they contend the trial court erred in admitting and instructing the jury on text messages between Haralson and Briana, admitting expert testimony on the meaning of those messages, and failing to instruct on the lesser offense of contributing to the delinquency of a minor. They also argue their convictions for trafficking must be reversed under the *Williamson* rule (see *In re Williamson* (1954) 43 Cal.2d 651), and their sentences are unlawful. Finding appellants' contentions unmeritorious, we affirm the judgments against them.

FACTS

On March 30, 2016, Santa Ana Police Detective Luis Barragan discovered an advertisement on Backpage.com that appeared to be offering the prostitution services of a minor.[1] The telephone number listed in the ad had an area code of 303, which covers Colorado. Posing as a sex purchaser, Barragan texted the number and arranged a one-hour "date" for later that day at the Travelodge Hotel in Anaheim for $220.

The police secured a room at the hotel and set up surveillance in the area. Before long, Briana, then age 17, arrived at the room and was taken into custody. She admitted working as a prostitute and giving her proceeds to appellants. She said Haralson provided her with protection, and Brewster drove her wherever she needed to go, like an Uber driver. While Briana was being interviewed inside the hotel room, she received several calls from the 303 number on her phone. She also received texts from that number, asking her if everything was okay. Pretending to be Briana, the police texted back asking to be picked up at a Denny's restaurant near the hotel.

Soon thereafter, surveillance officers saw a white car enter the Denny's parking lot. When the people in the car did not get out after it parked, the officers

[1] Backpage.com is an online advertising service that has been investigated by the federal government for facilitating sex trafficking. (See *Senate Permanent Subcommittee on Investigations v. Ferrer* (D.C. Cir. 2017) 856 F.3d 1080.)

contacted them to investigate. Brewster was in the driver's seat, Haralson was in the front passenger seat, and Jovon Williams was in the back of the car.[2] Inside the vehicle, the police found condoms, prepaid Visa cards and a loaded, unregistered gun. Brewster also had stationery from an Irvine hotel and various gas and restaurant receipts in his possession. Investigators determined that during the preceding two weeks, appellants, Briana and Williams stayed together at several hotels in the Orange County area.

For his part, Haralson admitted the gun was his. He and Williams tried to convince the police they had come from Colorado to pursue careers in the music industry. However, when the police looked on Haralson's phone, which corresponded to the 303 number they had called earlier, they discovered recent links to Backpage.com and multiple inquiries from prospective sex purchasers. There were also numerous text messages between Haralson and Briana on the phone.

At trial, Detective Barragan and Nathan Logan, an investigator for the California Highway Patrol, testified as experts on the subculture of pimps and prostitutes. They opined the text messages between Haralson and Briana were consistent with a pimp-prostitute relationship and indicated they were involved in the sex trade.

In closing argument, the prosecutor contended Haralson orchestrated and derived support from Briana's prostitution activities in Orange County from March 17 to March 30, 2016, the day they were arrested. The prosecutor also posited that Brewster aided and abetted those activities by providing Briana with lodging and transportation during that two-week period.

The star witness for the defense was Briana. She testified Haralson was her godfather and that she spent lots of time with his family while she was growing up in Colorado. In March of 2016, she, Haralson, Brewster and Williams drove to California

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[2] Williams was also charged in connection with this case, but he pleaded guilty and is not a party to this appeal. The record shows Haralson repeatedly warned him not to pursue a romantic relationship with Briana, whom Haralson referred to as his "merchandise," because it would interfere with Haralson's plan to use her as a prostitute.

to record rap music with a producer in Orange County. Briana also had a notion to make a little money on her own while she was out here. According to Briana, she used Haralson's phone to place ads on Backpage.com and communicate with prospective sex purchasers. However, she claimed she never actually engaged in any prostitution activity. She insisted appellants were friends and never pressured her to become a prostitute or tried to pimp her out.

The jury did not see it that way. It convicted appellants of trafficking a minor with the intent to engage in pimping and pandering (Pen. Code,[3] § 236.1, subd. (c)(1)), pimping a minor over the age of 16 (§ 266h, subd. (b)(1)), pandering by procuring (§ 266i, subd. (a)(1)) and unlawful gun possession (§ 25850, subd. (a)). The trial court sentenced Haralson to eight years in prison and gave Brewster a five-year term.

DISCUSSION

Admissibility of Briana's Texts

At trial, the prosecution introduced hundreds of text messages between Haralson and Briana to illuminate the nature of their relationship. While appellants do not dispute Haralson's texts were properly admitted into evidence, they argue Briana's texts constituted inadmissible hearsay. We disagree.

In many of the subject texts, Haralson asked Briana if she was "done" or "good," and she replied that she was. Other times, they discussed money, such as in this verbatim exchange:

> Briana: "He got $60"
>
> Haralson: "Take dat" "He suppose to have 220"
>
> Briana: "Hh $175"
>
> Haralson: "Ok"
>
> Briana: "He said $240 [if] I stay an hour"

[3] Unless noted otherwise, all further statutory references are to the Penal Code.

And in other conversations, Haralson would describe what a person was wearing ("He gotta grey hat") or where a person was (he's "in the lot looking for u", "he at desk"), and Briana would say where she was located ("I'm outside his door tell him I'm here", "tell him I'm by the blue sign by the entrance").

As noted above, the prosecution's expert witnesses testified these exchanges were consistent with the way pimps and prostitutes communicate with each other. Although appellants contend Briana's statements constituted inadmissible hearsay, we agree with the trial court that her statements were admissible as operative facts.[4]

"'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) Such evidence is generally inadmissible at trial. (*Id*. at subd. (b).) However, an out of court statement "may become relevant on some issue in a case merely because the words were spoken or written, and irrespective of the truth or falsity of any assertions contained in the statement. If a fact in controversy is whether certain words were spoken or written and not whether the words were true, evidence that these words were spoken or written is admissible as nonhearsay evidence.' [Citation.] Often, such evidence is referred to as "'"operative facts."' [Citations.]" (*People v. Fields* (1998) 61 Cal.App.4th 1063, 1068-1069.)

In *People v. Dell* (1991) 232 Cal.App.3d 248, the court applied the operative facts doctrine in a case involving alleged pimping and pandering. The case turned on whether the defendant's escort business was actually a front for prostitution activity. To prove it was, the prosecution introduced evidence the defendant's escorts had sexually propositioned several undercover police officers. On appeal, the defendant argued the escorts' statements were inadmissible hearsay, but the court disagreed on the

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[4] Given this conclusion, we need not decide whether, as respondent argues, Briana's statements were also admissible under the coconspirator exception to the hearsay rule. (See Evid. Code, § 1223.)

basis they were part of the very transaction under investigation and served to illuminate the nature of the activity in which the escorts were engaged. (*Id*. at pp. 258-260.) The court explained, "The statements were not offered to prove the escorts would actually perform these specific sex acts and at the quoted price. For example, there is no special significance in one escort's statement it would cost an additional $40 for oral copulation without a condom. The truth or falsity of what the escort said is immaterial. In these types of situations, the content of the words spoken is irrelevant, the significance is in the fact the words were uttered at all[,]" which takes them outside the scope of the hearsay rule. (*Id*. at p. 262.)

Likewise, here, Briana's various text messages to Haralson were not admitted for their truth, e.g., to prove Briana was actually "good" (i.e., safe), how much money a person had, or where Briana was located at any particular time. Rather, they were admitted to shed light on the nature of her relationship with Haralson and to show she was working for him as a prostitute. Therefore, they were admissible under the operative facts doctrine.

In arguing otherwise, appellants rely on *People v. Sanchez* (2016) 63 Cal.4th 665. *Sanchez* ruled hearsay is inadmissible as basis evidence to support the opinion of an expert witness unless the statement is independently admissible under state and federal law. (*Id*. at pp. 676, 686.) However, Briana's statements were not admitted as expert basis evidence. Rather, they were admitted in their own right to show how she and Haralson interacted with each other. And while appellants allege the introduction of Briana's statements violated their federal confrontation rights, they make no attempt to explain how any of her statements were testimonial, i.e., made under circumstances indicating they would be used at trial, which is fatal to their claim. (See *Davis v. Washington* (2006) 547 U.S. 813, 821 [only testimonial statements are subject to exclusion under the confrontation clause]; *People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 363-364 [courts may treat as waived any claim that is not supported by

legal argument and citation to authority].) Appellants have not established the introduction of Briana's statements violated the Sixth Amendment, and as we have shown, the statements were admissible under state law as operative facts. Therefore, we uphold the trial court's decision to admit them into evidence.

Jury Instructions Regarding Briana's Text Messages

Haralson argues the trial court should have instructed the jury sua sponte that it could not consider the statements in Briana's text messages unless they were made as part of a then-existing conspiracy. (See CALCRIM No. 418.) Such an instruction was given with respect to Brewster, in light of the fact the prosecution alleged he was liable under aiding and abetting and conspiracy principles. However, no such instruction was required as to Haralson because he was prosecuted as a direct perpetrator, and irrespective of the coconspirator exception to the hearsay rule, Briana's statements were admissible against him under the operative facts doctrine, as explained above. Thus, no instructional error occurred. (See *People v. Galambos* (2002) 104 Cal.App.4th 1147, 1162 [jury instructions will generally be upheld on appeal so long as they are correct under any applicable legal theory].)

Admissibility of Expert Testimony

Next, we consider whether the trial court erred in allowing the prosecution's expert witnesses to give their opinions about the meaning of various text messages that Briana and Haralson sent to each other. Appellants contend this testimony was improper because it was tantamount to an opinion about the ultimate issue in the case, i.e., whether they were guilty of the charged offenses. We disagree.

As a threshold matter, appellants failed to preserve this issue for appeal because although they objected to the expert testimony on various grounds, they did not object on the basis it constituted improper opinion testimony. (See *People v. Doolin* (2009) 45 Cal.4th 390, 437.) Nevertheless, we will address the merits of their claim because they contend their attorneys were ineffective for failing to raise it below.

Opinion testimony by an expert is admissible in a criminal prosecution "in circumstances where it will assist the jury to understand the evidence or a concept beyond common experience." (*People v. Torres* (1995) 33 Cal.App.4th 37, 45; Evid. Code, § 801, subd. (a).) "By and large, the relationship between prostitutes and pimps is not the subject of common knowledge. [Citations.]" (*United States v. Taylor* (9th Cir. 2001) 239 F.3d 994, 998.) Therefore, expert testimony on this topic, as well as the subculture of pimps and prostitutes, is generally permissible. (*Ibid.*; *People v. Leonard* (2014) 228 Cal.App.4th 465, 493, fn. 3.)

However, an expert "may not express an opinion on a defendant's guilt. [Citations.] The reason for this rule is not because guilt is the ultimate issue of fact for the jury, as opinion testimony often goes to the ultimate issue. [Citations.] 'Rather, opinions on guilt or innocence are inadmissible because they are of no assistance to the trier of fact. To put it another way, the trier of fact is as competent as the witness to weigh the evidence and draw a conclusion on the issue of guilt.' [Citation.]" (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 77.)

Appellants cite a variety of opinions from the prosecution's experts that they believe were improper. Many of those opinions expressed the experts' belief that a particular message between Haralson and Briana was "consistent with" prostitution activity. For example, when asked to explain an exchange in which Briana wrote, "He got $60," and Haralson replied, "Take dat. He suppose to have 220," Detective Barragan testified, "This is consistent with the prostitute telling her pimp that her sex purchaser showed up with $60. The pimp in turn is replying to her to take that money and expressing to her that he was supposed to have 220."

In a similar vein, Investigator Logan was asked about the numerous "I'm good" messages that Briana sent Haralson. He explained, "In a prostitute's line of work, sometimes they are robbed, raped, assaulted, and so [by texting 'I'm good'] they are

letting the[ir] pimp know that they are . . . safe. This is expected [and] routine [when they] encounter [a] sex purchaser."

Appellants assail these opinions on the basis they invaded the jury's province to decide whether the charges against them were true. However, "[s]imply because something a defendant does is 'consistent with' the modus operandi of some underworld caper, does not make him guilty of an offense." (*People v. Crooks* (1967) 250 Cal.App.2d 788, 792, fn. omitted [upholding vice officer's expert testimony that defendant's conduct was consistent with a particular prostitution theft scheme].) Therefore, it was permissible for Barragan and Logan to couch their opinions in those terms. (See, e.g., *People v. Clay* (1964) 227 Cal.App.2d 87, 99 [upholding the admissibility of expert testimony that "told the jury that the pertinent facts and circumstances were consistent with the modus operandi of till tappers."].)

We recognize the experts in this case did not always use the term "consistent with" in giving their opinions about what Haralson and Briana's text messages signified; sometimes they opined without qualification that the two were communicating and acting like pimps and prostitutes. But again, "acting like" a pimp is clearly different from saying someone *is* a pimp. (See *People v. Leonard, supra,* 228 Cal.App.4th at pp. 492-493 [finding it was improper for an expert witness to testify the defendant *was in fact* a particular type of pimp].) While this testimony tended to prove Haralson and Briana were involved in illicit activity, it did so only by helping the jury understand their messages and arrive at its own conclusion about the case. At no point did either expert speak to whether appellants harbored the requisite intent for the charged offenses, or express their opinion about whether appellants were guilty of those charges.

Viewing the expert testimony as a whole, we conclude it was properly admitted to assist the jury in deciding the truth of the charges and did not usurp the jury's duty in that regard. The trial court did not abuse its discretion in admitting it, and defense counsel was not ineffective for failing to challenge it on that basis.

Failure to Instruct on Lesser Offense

Appellants contend the trial court erred in failing to instruct the jury on contributing to the delinquency of a minor as a lesser included offense of human trafficking. We cannot agree.

Although appellants did not ask the trial court to instruct the jury on contributing to the delinquency of a minor, "California law has long provided that even absent a request . . . a trial court must instruct a criminal jury on any lesser offense 'necessarily included' in the charged offense, if there is substantial evidence that only the lesser crime was committed." (*People v. Birks* (1998) 19 Cal.4th 108, 112.) "[A] lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser." (*Id.* at p. 117.)

In count 1, appellants were charged with violating section 236.1, subdivision (c)(1). That provision states, "A person who causes, induces, or persuades, or attempts to cause, induce, or persuade, a person who is a minor at the time of the commission of the offense to engage in a commercial sex act, with the intent to effect or maintain a violation of [enumerated crimes, including pimping and pandering] is guilty of human trafficking." (§ 236.1, subd. (c)(1).)

The crime of contributing to the delinquency of a minor occurs when a person lures a minor away from their parents or commits an act that causes or encourages a minor to come within the jurisdiction of the juvenile court pursuant to sections 300 (dependency), 601 (truancy) or 602 (delinquency) of the Welfare and Institutions Code. (§ 272.)

Focusing solely on section 602 of the Welfare and Institutions Code, respondent argues that by inducing Briana to become a prostitute, appellants did not commit an act that would subject her to the delinquency jurisdiction of the juvenile court

because she was a victim of their actions and immune to prosecution for her illicit conduct. (See Evid. Code, § 1161.)[5]

This may be true. But respondent overlooks the fact the crime of contributing to the delinquency of a minor applies not only when the minor is induced to engage in criminal conduct, it also applies when the minor is induced to engage in conduct that subjects them to the dependency jurisdiction of the juvenile court under Welfare and Institutions Code section 300. Subdivision (b)(2) of that section expressly authorizes the juvenile court to exercise jurisdiction over a child who is a victim of human trafficking. Therefore, by inducing Briana to become a prostitute, appellants necessarily contributed to her delinquency for purposes of section 272.

However, a trial court is not required to instruct on a lesser included offense unless there is substantial evidence the defendant committed only the lesser and not the charged offense. (*People v. DePriest* (2007) 42 Cal.4th 1, 50.) No such evidence exists in this case. To the contrary, the record shows Haralson secured multiple sex customers for Briana and was directly involved in facilitating her prostitution activity, and Brewster was instrumental to the sex-for-money scheme in that he provided transportation and arranged lodging for Briana. While Briana absolved appellants of wrongdoing at trial, she told the police she was giving them her prostitution earnings. The overwhelming evidence of guilt on the human trafficking charges obviated the need for instructions on the lesser included offense of contributing to the delinquency of a minor. (Cf. *People v. Carter* (2005) 36 Cal.4th 1114, 1184-1185 [no error in failing to instruct on second degree murder where evidence amply demonstrated killings were premeditated].)

Not that such instructions would have made a difference at trial anyway. Appellants' theory of the case was that they did not do anything to encourage or induce

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[5] That section provides, "Evidence that a victim of human trafficking, as defined in Section 236.1 . . ., has engaged in any commercial sexual act as a result of being a victim of human trafficking is inadmissible to prove the victim's criminal liability for the commercial sexual act." (Evid. Code, § 1161, subd. (a).)

Briana to become a prostitute. Rather, Briana did everything on her own and that, except for unlawfully possessing a firearm, they did not break any laws. That claim is wholly inconsistent with appellants' lesser included offense theory. Having put on an all-or-nothing defense they cannot now complain that no instructions were given to cover a half-a-loaf defense. Thus, any error in failing to instruct on the lesser offense of contributing to the delinquency of a minor was harmless. (See *People v. Waidla* (2000) 22 Cal.4th 690, 735–741; *People v. Nakai* (2010) 183 Cal.App.4th 499, 511–512.)

Application of the Williamson Rule

Invoking the venerable rule articulated in *In re Williamson* (1954) 43 Cal.2d 651 (*Williamson*), appellants contend their convictions for human trafficking must be reduced to convictions for pandering. Again, we disagree.

In *Williamson,* our Supreme Court ruled that when a general statute includes the same subject matter as a more specific statute, the latter will be considered an exception to the former. (*Id*. at p. 654.) Generally speaking, the rule "precludes prosecution under a general statute when a more specific one describes the conduct involved. [Citations.]" (*Finn v. Superior Court* (1984) 156 Cal.App.3d 268, 271.) However, because the rule is "'designed to ascertain and carry out legislative intent'" (*People v. Murphy* (2011) 52 Cal.4th 81, 86), it will not be applied when it would subvert the will of the Legislature. (See, e.g., *People v. Jenkins* (1980) 28 Cal.3d 494, 507-508 [refusing to apply the *Williamson* rule when the legislative intent of the subject offenses revealed they were not intended to be exclusive of one another].)

In enacting section 236.1, the Legislature declared the statute shall not be construed "as prohibiting or precluding prosecution under any other provision of law or to prevent punishment pursuant to any other provision of law that imposes a greater or more severe punishment than provided for in [the human trafficking] act." (Stats. 2005, ch. 240, § 13, p. 2526.) Given this legislative directive, appellants were properly

prosecuted for and convicted of both human trafficking and pandering. The *Williamson* rule does not compel a contrary conclusion.

Sentencing Issue

Lastly, appellants argue their sentences for human trafficking must be vacated because section 236.1 violates the constitutional proscription against cruel and unusual punishment. This claim also fails.

Both the California and United States Constitutions prohibit the imposition of cruel or unusual punishment. (U.S. Const., 8th Amend.; Cal. Const., art. 1, § 17.) However, successful challenges based on that prohibition are extremely rare. (*People v. Weddle* (1991) 1 Cal.App.4th 1190, 1196 ["exquisite rarity"].) Absent gross disproportionality in the defendant's sentence, no Eighth Amendment violation will be found. (*Ewing v. California* (2003) 538 U.S. 11; *Lockyer v. Andrade* (2003) 538 U.S. 63.) Similarly, a sentence will not be found unconstitutional under the state Constitution unless it is so disproportionate to the defendant's crime and circumstances that it shocks the conscience or offends traditional notions of human dignity. (*People v. Dillon* (1983) 34 Cal.3d 441; *In re Lynch* (1972) 8 Cal.3d 410, 424.)

In arguing their sentences are cruel and unusual, appellants pay little heed to the actual sentences they received.[6] Instead, they mount a facial attack on section 236.1. That statute authorizes a prison sentence of five, eight or twelve years for trafficking a minor. (§ 236.1, subd. (c)(1).) In comparison, the crime of pandering carries a sentence of three, four or six years, even when the victim was only 17 years old, as was the case here. (§ 266i, subd. (a), (b)(1).) Working on the assumption pandering is a more serious offense than trafficking, appellants argue this sentencing scheme is illogical and constitutionally impermissible. However, that assumption is incorrect.

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[6] For the crime of human trafficking, the trial court sentenced Haralson to eight years in prison, and it sentenced Brewster to a five-year term. The court stayed appellants' sentences for pimping and pandering under section 654 and imposed a concurrent term for their firearm violations.

By its terms, the pandering statute prohibits the "procure[ment of] another person for the purpose of prostitution." (§ 266i, subd. (a)(1).) In a similar vein, the human trafficking statute makes it a crime for anyone to "cause[], induce[], or persuade[], or attempt[] to cause, induce, or persuade, a person who is a minor at the time of the commission of the offense to engage in a commercial sex act[.]" (§ 236.1, subd. (c)(1).) However, human trafficking also requires the intent to "effect or maintain" a violation of certain enumerated crimes, including pimping or pandering. (*Ibid*.)

The fact human trafficking requires this additional mens rea indicates it is more serious than the crime of pandering. Indeed, the use of the word "maintain" in section 236.1, subdivision (c)(1) suggests the statute is intended to target ongoing trafficking schemes, not mere procurement, which is what the pandering statute proscribes. Since human trafficking is more serious than pandering, it only makes sense it is punished more severely than pandering. This sentencing discrepancy does not offend the constitution, nor does it provide grounds for disturbing appellants' sentences.

DISPOSITION

The judgments are affirmed.

BEDSWORTH, J.

WE CONCUR:

O'LEARY, P. J.

ARONSON, J.